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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 908.

GEORGE LAWLEY & SONS CORPORATION,
Defendant, Appellant,

v.

CHARLES J. SOUTH,
Plaintiff, Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS H. MAHONY,
Counsel for Plaintiff, Appellee.

JOSEPH G. BRYER,
Of counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The case has been stated in the petition filed in the case.

Points to be Discussed.

I. There was no estoppel from recovery for overtime by the plaintiff, appellee (herein afterwards referred to as the plaintiff), and the trial judge correctly instructed the jury on this question.

II. The plaintiff was not exempt from the benefits of the Act by reason of being a bona-fide executive or administrative official as defined by the Act.

III. The regulations interpreting the Act as promulgated by the Administrator are in no way binding on the Court in interpreting the Act.

IV. The verdict of the jury required the Court to enter judgment in the amount which it did.

Argument.

I. The plaintiff was not estopped from recovering overtime.

The defendant was not entitled to instructions to the jury in the form requested.

These requests were not a correct statement of the law of estoppel and if given by the trial judge would have been highly objectionable.

> "To constitute an estoppel, it is essential that the party charged therewith should have done or refrained from doing some act or pursued some cause of conduct on which estoppel may be based, and that in taking the former position he should have acted with knowledge of his rights, and have been aware of the facts in respect to the estoppel claimed. In addition it is essential that the party invoking the estoppel should have been misled by the acts or conduct of the party against whom the estoppel is claimed, that he changed his position in reliance thereon, and was justified in so doing and that he was prejudiced thereby, or a benefit resulted to the party against whom the estoppel is claimed."
>
> 31 C.J.S. p. 345.

The defendant in its requests stated only half the rule. The Court gave that part of the rule in substance and went

on and instructed the jury fully as to the second part of the rule. It was for the jury to decide whether all the elements were present. It might be argued that the jury might have found either way on the issue, but it certainly cannot be claimed that there was no evidence for their consideration.

Estoppel is a question of fact for the jury on all the evidence.

Commonwealth Fin. Corp. v. *Holland System*, 263 Mass. 10:

"It was for the jury on all the evidence to find whether the plaintiff's agent, by remaining passive at a time when his silence might produce an erroneous impression, created an estoppel which thereafter precluded it from asserting title."

See also *Shaw* v. *Pinkham*, 128 Me. 376.

"Whether estoppel has been established is a question of fact, where it is possible to draw more than one inference from the evidence."

Taylor v. *Jones*, 242 Mass. 210; cert. den. 260 U.S. 742.

"In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise might have been done and which has resulted to his harm, and that the other knew or had reasonable cause to know that such consequence might follow. But the doctrine of estoppel is not applied except when to refuse it would be inequitable."

Angello v. *Hanover Trust Co.*, 253 Mass. 160, at 167.

Barton v. *Morin*, 281 Mass. 98.

The law does not regard estoppels with favor, or extend them beyond the requirements of the transactions in which they originate.

Lunt v. *Aetna Life Ins. Co.*, 261 Mass. 469, 473.
Robbins v. *Bay View Auto Parts Co.*, 239 Mass. 414, 420, 422.
Boston & Albany R.R. v. *Reardon*, 226 Mass. 286, 291.

The burden of proof was upon the defendant to establish such estoppel by a fair preponderance of the credible evidence.

Novo v. *Employers Lia. Assurance Corp.*, 295 Mass. 232, 234.
Lunt v. *Aetna Life Ins. Co.*, 261 Mass. 469, 472, 473.

It was therefore incumbent upon the defendant to establish the proposition that, as a matter of law upon all the facts the Trial Court was bound to rule that the plaintiff was so estopped.

It is the duty of the Court to charge and define the law applicable to estoppel, but it is the province of the jury to say whether the facts of the particular case constitute estoppel as defined by the Court.

19 Am. Jur. 856.

In a number of cases under the Act the employers have sought to set up estoppel as a defense. Cases where the question has been raised include *Lewis* v. *Nailling* (D.C. Tenn., 1940), 36 Fed. Supp. 187, where it was held that recovery was not barred by the employee's failure to demand the sum due prior to the institution of the action or because of his anticipation of and accumulation of evidence

for the action during his employment; also *Drenne* v. *Mutual Life Ins. Co. of N.Y.* (N.Y., 1943), 6 Labor Cases No. 61492, where it was held an employee was not estopped from recovery merely because he failed to state to his employer that his employment was subject to the Act and to demand overtime pay under its provisions.

The Trial Court gave ample and exhaustive instructions on the question of estoppel. The defendant noted no objection thereto. Its objection is limited to the failure of the Court to give requests Nos. 13 and 14. Clearly these were not a correct statement of the law. Counsel for the defendant in his closing argument had conceded that the plaintiff had no dishonest purpose but was honest in his conduct throughout (R. p. 41). He therefore left it with the jury that no improper motive actuated the plaintiff with reference to the whole transaction.

II. The defendant in its brief overlooks this force of the interpretations expressed in interpretative bulletins. They are not binding on the Courts, but are only entitled to great weight.

United States v. *American Trucking Assoc.*, 310 U.S. 534.
Walling v. *Cohen*, 48 Fed. Supp. 859.
United States v. *Darby*, 312 U.S. 100.
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349.

If the Administrator provided for in the Act has stultified himself by an absurd interpretation of the Act in defining a bona-fide executive in administrative positions in the set-up of an employer's staff, the Court is bound to disregard it. The absurdity of the position taken by the defendant is set out in the opinion of the Circuit Court of Appeals. It would mean that if a concern had more than

five employees then the definition contained in section 541.1F of the Regulation would never apply.

III. The argument advanced and authorities cited under II have equal force and applicability to this issue.

IV. The Court found no difficulty in entering judgment under Rule 58 F.R.C.P. The amount of unpaid overtime compensation was fixed at $2864.09. Figuring this back, it is clear how it was arrived at:

In the period from October, 1938, to October, 1939, the jury found the plaintiff was entitled to 225 hours. The rate per hour during all this period was $2.556 (R. p. 60), it being a 44-hour week, making a total of	$575.10
For the period from October, 1939, to October, 1940, the jury found that the plaintiff was entitled to 185 hours overtime. The rate during this period was $2.678 per hour (R. p. 60), it being a 42-hour week, making a total of	495.43
The last period, October, 1940, to October, 1941, presents some complication at first glance, due to the change of rate in February, 1941, and the fact that the jury found for a lesser amount of hours than the plaintiff claimed. By taking all the hours testified to by the plaintiff as having been worked by him before the change in rate at the lower rate we have 52½ hours at $2.8125, equalling	147.66
and the balance of the 500 hours found by the jury at the higher rate, to wit, 447½ at $3.67 per hour, totalling	1,645.90
making a total of	$2,864.09

This was the amount fixed by the Court in its judgment.

It is evident that during the last period, when there was a change in the rate of pay, the Court took all the overtime to which the plaintiff had testified and computed the amount due thereon up to that date at the established rate. The number of hours deducted by the jury from the plaintiff's claim of overtime was taken by the Court from the period when the higher rate prevailed. The defendant could not be harmed by this procedure; as a matter of fact he undoubtedly benefited in a substantial degree. From this it appears that the defendant received the benefit of a maximum allocation of the hours of overtime found to have been worked by the plaintiff to the lower rate. If the Court was able to arrive at a figure that was based on an intelligent analysis of the special verdict of the jury, it seems that it should be adopted. In any event, the defendant saved no rights to the entry and made no objection thereto.

The plaintiff submits that the petition for a writ of certiorari should not be granted. The defendant has not argued the question involved in the allegation in its petition that the problems inherent in this case involve an important question of Federal law which has not been settled by this Court. We assume he does not stress the point, but in any event it is apparent on the record that no such question is involved. The validity of the Act has been passed upon many times by this Court. The citation of authority for this proposition seems unnecessary.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 908

GEORGE LAWLEY & SON CORPORATION, PETITIONER

v.

CHARLES J. SOUTH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

As the petition for certiorari in this case raises a question as to the proper construction of regulations issued by the Administrator of the Wage and Hour Division, pursuant to the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201), we deem it appropriate to file this memorandum as *amicus curiae* on his behalf on that point. See *Illinois Commerce Comm.* v. *Thomson*, 318 U. S. 675, 681. The Regulations[1]

[1] Regulations, as amended, Title 29, Chapter V, Code of Federal Regulations, Part 541, 5 F. R. 4077. The portion of these Regulations pertaining to the term "executive" is printed as Appendix I.

involved are those defining the term "bona fide executive capacity" and the other terms included in Section 13 (a) (1) of the Act. Section 13 (a) (1) provides an exemption to:

> * * * any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *

The specific provision of the Regulations in question here is subsection (F) which provides as one of the qualifications for a "bona fide executive," the following:

> (F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Petitioner contends that "the basis for estimating the 20 percent is the total number of hours worked by all of the employees under the direction of the one whose status is under consideration" (pet. 13). The Court of Appeals correctly held that this construction was unwarranted. In rejecting petitioner's interpretation, the court below stated that while a literal grammatical read-

ing of the provision seemed to support defendant's contention, it was unreasonable so to construe the provision, for the result of such a construction would be that "every employee, no matter what his duties, would be exempt under this clause of the definition if there were 5 or more employees working under him" (R. 243). This, the court said, would be an arbitrary result which it would not presume was intended by the Administrator, as there were other possible, more reasonable interpretations, namely: (1) that the provision meant 20 percent of the standard workweek each one of the employees under plaintiff's direction "customarily worked," or (2) that it meant 20 percent of the plaintiff's time. The court pointed out that under either one of these interpretations the evidence supported the conclusion that plaintiff was not exempt.

The first alternative suggested by the court below is the one intended by the Administrator, as is expressly pointed out in the printed report[2] explaining the Regulations, which apparently was not brought to the attention of the Circuit Court of Appeals. On page 15 of the Report it is

[2] Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition of "Executive, Administrative, Professional * * * Outside Salesman," effective October 24, 1940, which was officially adopted by the Administrator as his construction of the regulations. The pertinent paragraphs from this Report are printed as Appendix II.

pointed out that the base to be used in applying the 20 percent is "the standard workweek of the employees under the direction of the executive in question." As a practical example the Report states that where the standard workweek approximates 40, it would be proper to take as the base, in applying the 20 percent rule, the 40-hour week and consider 8 hours per workweek as the maximum allowance of non-exempt work. This makes it clear that it was intended that the standard or average workweek of the non-exempt employees was to be used as a base, and not the total of all the hours of all of the employees. This construction has been followed by the Administrator consistently since the adoption of the Regulations in October 1940.[3]

[3] The following opinions are representative of the Administrator's interpretations:

(1) Opinion dated February 9, 1944, from the chief attorney of the Wage Hour Section to the regional attorney in Philadelphia, with respect to a problem concerning employees of Henry Disston & Sons, Inc., Philadelphia, Pennsylvania. The memorandum contains the following paragraph with respect to the 20 percent limitation:

"The 20-percent limitation on nonexempt work laid down in subdivision (F) of section 541.1 must be measured by the *standard* workweek of the employees under the direction of the executive employee in question. (See Stein report, page 15.) In the instant case, since twelve of the 14 employees supervised by the executive in question regularly work 48 hours a week, such workweek is the standard workweek. Therefore, the executive may spend no more than 9.6 hours a week on nonexempt work without losing the exemption (20 percent of 48 hours). The same limitation is effective

Respectfully submitted.

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MAY 1944.

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in those weeks in which the employees work a number of hours in excess of the regularly scheduled workweek, since the standard workweek of 48 hours is unchanged."

(2) Memorandum dated February 29, 1944, from the chief attorney, Wage Hour Section, to the regional attorney in Dallas, Texas, relative to a problem concerning employees of the Southwestern Bell Telephone Company. The memorandum contains the following statement with respect to subsection (F):

"* * * we direct your attention to the requirement that the 20-percent limitation in subdivision (F), section 541.1, is based on the *standard workweek* of the nonexempt employees under a supervisor's direction (Stein report, page 15)."